IN THE

Supreme Court of the United States

October Term, 1978.

No. 78-1069

BALTIMORE AND OHIO CHICAGO TERMINAL RAILROAD COMPANY, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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Petitioners, common carriers by railroad listed in Appendix A, pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Third Circuit.

THE OPINIONS BELOW.

The opinion of the Court of Appeals is reported at 583 F.2d 678 and appears in Appendix B, A3. The order of the Court denying rehearing also appears in Appendix B, A34. The interim report of the Interstate Commerce

Commission appears at 349 I.C.C. 411 (1975) and is printed in Appendix B, A35. The final report and subsequent order of the Commission appear at 353 I.C.C. 567 (1977) and are printed in Appendix B, A86.

JURISDICTION.

The judgment of the Court of Appeals was entered on September 6, 1978. A timely petition for rehearing was denied on October 5, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

QUESTIONS PRESENTED.[1]

1. Whether the Commission has authority to divide revenues—in this instance, demurrage revenues—between railroads under former Section 1(6) (now revised 49 U.S.C. 10750) and without observing the requirements of former section 15(6)(a) of the Interstate Commerce Act (now revised 49 U.S.C. 10705(b) and (e))?

2. Whether the Commission's order is invalid under the provisions of former Section 17(14)(b) of the Interstate Commerce Act?

3. Whether the Commission's order permits unlawful rebates contrary to the provisions of former Sections 6(7) and 15(15)(a) of the Interstate Commerce Act (now 49 U.S.C. 10761 and 10747) and former Section 41(1) of the Elkins Act (now 49 U.S.C. 11903)?

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1. In the event certiorari issues, petitioners will also raise the question of whether the Interstate Commerce Commission's order is supported by "adequate rationale".

STATUTES INVOLVED.

The principal statutes involved are: [2]

Interstate Commerce Act

49 U.S.C. 10750, former 49 U.S.C. 1(6)
49 U.S.C. 10761, former 49 U.S.C. 6(7)
49 U.S.C. 10705(b) and (e), former 49 U.S.C. 15(6)(a)
49 U.S.C. 10747, former 49 U.S.C. 15(15)
49 U.S.C. 17(14)(b), eliminated in recodification
49 U.S.C. 11903, former 49 U.S.C. 41(1)

Administrative Procedure Act

Section 10, 5 U.S.C. 706

These statutes appear in Appendix C, A142.

STATEMENT.

This is a case of first impression.

Prior to and since the 1887 enactment of the Interstate Commerce Act (Act) demurrage (car detention) charges against shippers have been assessed and retained as revenues by the originating or terminating railroad and without regard to the ownership of the car. In this instance, the Commission has undertaken to *divide* these revenues, not on the basis of Section 15(6)(a) [3] considerations governing divisions between railroads, but on the basis of Section 1(6),[4] as amended by the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act).

2. On October 17, 1978, the Interstate Commerce Act, formerly 49 U.S.C., prec. Section 1, *et seq.*, was recodified without substantive change as Title 49—Transportation, Subtitle IV— Interstate Commerce, 49 U.S.C. 10101, *et seq.*, Public Law 95-473, 95th Cong., 92 Stat. 1337. Petitioners will use the former description, e.g., "Section 1(6) of the Act" in order to provide continuity with the opinions of the lower court and the I.C.C.

3. Now revised 49 U.S.C. 10705(b) and (e).

4. Now revised 49 U.S.C. 10750.

In 1970, the railroads sought and eventually were granted an increase in their published demurrage charges. *Demurrage Rules And Charges, Nationwide,* 340 I.C.C. 83 (1971). The previous charges of $5, $10 and $15 per car, which had existed since 1964, were increased to $10 per car for each of the first four days (after elapse of the normal 48-hour free time), $20 for each of the next two days and $30 for each day thereafter.

On October 19, 1972, the Commission issued its notice proposing to require the collecting railroad to remit to the car owner all demurrage charges accrued in excess of $10 per car per day. The stated purpose of the proposal was to:

> "create an added incentive for the railroad car owner to acquire additional cars . . . [and to] remove any inducement on the part of the non-owner railroad to encourage detention of foreign cars in order to benefit from collection of demurrage charges."

After the receipt of comments and an interim report, 349 I.C.C. 411, the Commission (Commissioners Christian, MacFarland and Murphy dissenting) issued its regulation requiring the collecting railroad to remit to the car owner, whether railroad or private, all demurrage collected in excess of $10 per day. *Remittance Of Demurrage Charges By Common Carriers Of Property By Rail,* 353 I.C.C. 567 (1977) (A86).

This totally irrational result was reached with no evidence either that car owners would spend this "new money" for additional cars or that any "non-owner" had actually "encouraged" detention. In fact, the few railroads supporting the proposition strenuously objected to any "earmarking" of the funds for car acquisition purposes, and there was never an explanation of how any railroad, car

owner or not, could possibly "encourage" detention, the latter being wholly within the control of the shipper.

Recognizing the gravity of the situation, the Commission, by subsequent order, concluded to stay the remittance order pending judicial review because of the "serious legal question involved" and the "irreparable injury" to petitioners (A140-1).

The Court of Appeals for the Third Circuit sustained the Commission's order, but on different grounds than those stated by the agency.

REASONS FOR GRANTING THE WRIT.

I. Section 1(6) Does Not Authorize the Commission to "Divide" Demurrage Revenues. Authority to Divide Railroad Revenues Lies Only Under Section 15(6)(a), Which the Commission Did Not Here Pursue.

When the Commission initially embarked on this precedent-shattering program in 1972, it cited no less than 13 different sections or subsections of the Interstate Commerce Act (Act) as providing it with the authority to divide demurrage revenues. In its final report, however, it rested jurisdiction on Section 1(6), as amended under the 4R Act.[5] The amendment in question added the following language (49 U.S.C. 10750):

> "A rail carrier . . . shall compute demurrage charges, and establish rules related to those charges, in a way that fulfills the national needs related to—
>
> (1) freight car use and distribution; and (2) maintenance of an adequate supply of freight cars to be available for transportation of property . . ."

There is not the slightest suggestion by the Commission at any point here that the then existing demurrage charges were not so designed. In fact, precisely the contrary finding was made when the carriers last increased the prior changes in *Demurrage Rules, supra,* 340 I.C.C., p. 90:

> "It is important to bear in mind that, except in extraordinary circumstances, car detention is solely within the control of the shipper. Those who release cars promptly will not be adversely affected by any of the increased charges. On the other hand, to the extent that such increases influence the more prompt re-

5. Railroad Revitalization and Regulatory Reform Act of 1976.

> lease of equipment . . . the entire shipping public and the carriers will benefit. We believe that the charges hereinafter approved . . . will go a long way in achieving the desired result."

Contrary to the express direction of Section 1(6), however, the Commission did not here "compute" anything. The level of demurrage charges to the shipper remains unchanged, and if the shipper is content to hold the car at today's demurrage rate, there is no reason why he would be pressured into an earlier release by what the Commission now proposes. The sole and undeniable result is the shifting of millions of dollars within and out of the railroad industry with no effect whatsoever on car utilization.

The Commission's view is that while amended 1(6) authorizes only the "computation" of demurrage, the legislative history of the amendment supports a "division" of the revenues. In this context, the Commission refers to the following quote from the Report of the Committee on Interstate and Foreign Commerce:

> "The purposes of the proposals [to divide demurrage revenues] are to create an added incentive for the car owner to acquire additional cars and remove any inducement to the nonowner to encourage detention of foreign cars in order to benefit from collection of demurrage charges." (353 I.C.C., p. 573, A95).

There is, of course, no suggestion of record that the collecting railroad would—or possibly could—"encourage" the detention of any car, owned or foreign. If the consignee elects to hold a car and pay the established demurrage rate, he may do so—by tariff—*ad infinitum*. The striking feature here is the "bootstrap" operation of unprecedented extent by an administrative agency, i.e., the

quotation immediately above was in fact lifted bodily from a letter by the Commission itself to the Committee. The Committee was only commenting on the Commission's pending proceeding.

The lower Court was not particularly impressed with this *modus operandi*, but it sustained the Commission on different grounds:

> "While the language of § 1(6) does not specifically authorize remittance to car owners, it is equally clear that the statute does not prohibit such an arrangement."

From this, the Court reasons that any question of interpretation, e.g., whether the term "compute" includes authority to "divide," should be resolved in favor of the agency. That conclusion alone contravenes the many expressions of both the judiciary and the agency itself: the Commission is a creature of statute and has only those powers expressly granted by the Congress. *Seatrain Lines v. United States,* 64 F. Supp. 156, 160 (1946); *United States v. Pennsylvania R.R. Co.,* 242 U.S. 208 (1916); *Wharfage Charges At Atlantic And Gulf Ports,* 157 I.C.C. 663, 689 (1929).

In indulging the Commission's interpretation of amended 1(6), moreover, the lower Court ignored those very provisions of the Act which this Court, time and again, has referred to in reviewing this agency's actions with respect to any division of revenues.[6] And, in so doing, the Third Circuit's opinion contradicts one of most recent vintage by the Fifth Circuit, wherein this Court, except on a limited and non-substantive basis, denied certiorari.

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6. The issue of division of revenues under 49 U.S.C. 15(6)(a) was fully briefed in the Court of Appeals.

Aberdeen & Rockfish R. Co. v. United States, 565 F.2d 327 (C.A. 5, 1977) involved the propriety of a terminal surcharge levied by the Long Island Rail Road Company (LIRR) over and above its joint rates with other railroads, such surcharge to accrue solely to LIRR to cover the additional expenses incurred by reason of increased railroad retirement taxes. This revision of existing revenues—approved by the Commission—was set aside by the Fifth Circuit with the following:

> "The Supreme Court, affirming a three-judge court in the Eastern District of Louisiana has made it clear that a departure from the equal-factor basis of divisions of joint rates can be allowed only on the basis of specific findings. *Aberdeen & Rockfish R. Co. v. United States,* 270 F. Supp. 695 (E.D. La., 1967), affirmed *Baltimore & Ohio R. Co. v. Aberdeen & Rockfish R. Co.,* 393 U.S. 87 . . . In the case at bar, such findings were not made by the ICC because it reasoned that the Long Island's terminal surcharge was an 'add-on' and not a modification of the joint rates. We reject this reasoning as totally unrealistic.
>
> "We regard the present case as involving in economic terms a change in the joint rates and divisions thereof. It could not be doubted that if the Long Island added a terminal surcharge avowedly to increase its profits or to cover wage increases for all its employees, and the ICC ordered the other railroads to collect from shippers such amounts as well as joint rates this would constitute an undermining of both joint rates and equal division of joint rates. We see no difference when the add-on is to recoup tax payments." (565 F.2d, p. 335)

There is no difference between the result sought there by LIRR and that intended here. Whether described as such

or not, the Commission's proposal to divide—as distinguished from "compute"—demurrage revenues runs afoul of Section 15(6)(a), which requires, "after full hearing," a finding that the existing apportionments of joint rates and *charges* are unreasonable or otherwise unlawful and that due consideration be given to:

a) efficiency of carrier operations;

b) revenue required to pay operating expenses;

c) taxes; and,

d) fair return on investment.

New England Divisions Case, 261 U.S. 184, 203 (1923). *All* of these elements *must* be considered by the Commission. *Atchison, T. & S. F. R. v. United States*, 225 F. Supp. 584, 606-7 (1964). *None* of these considerations were adverted to here by the I.C.C. or by the lower court.

Remand is imperative if the Congressional safeguards now afforded the carriers with respect to their proper share of joint revenues are to remain inviolate.

II. The Lower Court Erred in Refusing to Enforce the Statutory Time Limitation.

Section 303(b) of the 4R Act added the following to Section 17 of the Interstate Commerce Act:

> "Within one year after the date of the enactment of this subdivision, the Commission shall conclude or terminate with administrative finality, any formal investigative proceeding with respect to a common carrier by railroad which was instituted by the Commission on its own initiative and which has been pending before the Commission for a period of three or more years following the date of the order which instituted such proceeding." (Former 49 U.S.C. 17(14)(b)).

It is indisputable that the investigation at hand began almost 3½ years prior to the enactment of 4R and was not concluded until 14 months thereafter, and the lower Court expressly rejected the Commission's argument that this proceeding was an "informal" investigation and therefore exempt from the statutory requirement. The Court, however, then declined to enforce the very limitations it had already found applicable, essentially on the grounds that the Congressional directive to "complete" was not "absolute" and equitable considerations, i.e., "the vast resources that have obviously been extended in the course of Ex Parte No. 289" made it inappropriate to enjoin the order for remittitur (A26-30).

Regardless of the expenditure of effort, the intent of the Congress is clear, and it was the absolute duty of the lower Court to enforce the law as written. Instead, that Court, for all practical purposes, simply eliminated 17(14)(b).

That the lower Court in fact thwarted the Congressional purpose to do away with Commission "foot-dragging" is obvious from subsequent developments. In the recodification of the Act, 17(14)(b) was eliminated as:

> "Executed. Provided that within one year after February 5, 1976, formal investigative proceedings with respect to a common carrier by railroad instituted by the Commission which had been pending for 3 or more years *would terminate.*" [7]

Obviously, the Congress terminated 17(14)(b) under the impression that the Commission had complied with the statutory directive. The lower Court finds that the Commission, at least in this instance, had not complied, and it erred in refusing to enforce the limitation.

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7. Report of the Committee on the Judiciary, House of Representatives, on H.R. 10965, Report No. 95-1395, July 26, 1978.

III. The Lower Court's View of Demurrage Charges Permits Rebates to Shippers in Violation of Sections 6(7), 15(15), and 41(1) of Title 49.[8]

While the lower Court expressly recognizes that a payment to a private car-owning shipper without tariff authority and in excess of the costs incurred would result in an unlawful rebate, it declines to interfere with the proposed remittitur on the perfectly astonishing ground that a demurrage charge is neither a "rate" under 41(1) nor a "charge" under 15(15). Rather, says the Court,

> "the essential nature of demurrage is that of a car service regulation,"

and therefore the remittance of demurrage charges does not constitute a departure from the published freight rates (A32-3). This is not only a "first" in transportation history, but a misconception of monstrous potential.

Demurrage, whether of "car service" genre or not, has always been treated as any other published tariff charge. It can be collected *only* if it is published in tariffs on file with the Commission, *Berwind-White Coal Mining v. Chicago & E. R.R.*, 235 U.S. 371, 375 (1914), and both carriers and shippers are subject to sanctions where they fail to collect or pay it per tariff:

> "Demurrage charges are part and parcel of the transportation charges, and are covered by the same rules of law. They are a part of the tariff, and must be collected from the shipper or the consignee of the freight to the same extent as the charge for carriage. A penalty is imposed on the carrier for failure to collect (Union Pacific Ry. v. Goodridge, 149 U. S. 690, 691); the purpose of the law being, of course, to secure absolute equality between shippers. . . .

8. Now 49 U.S.C. 10761, 10747 and 11903.

> Mistake, inadvertence honest agreement, or good faith are alike, under such circumstances, unavailing." *Davis v. Timmonsville Oil Co.*, 285 F. 470, 472 (1922).

The lower Court's construction of the law renders invalid all of the previous decisions by both the Commission and this Court rendered in response to the Congressional prohibition against departure from the published tariff rate *"by any device whatsoever"* (49 U.S.C. 6(7)).

> "Any and all means to accomplish the prohibited end are banned." *Union Pacific Ry. Co. v. United States*, 313 U.S. 450, 462 (1941).

Payments in the nature of the proposed non-tariff remittitur to car-owning shippers obviously reduce the *net* amount of the published freight charges paid by those shippers and inevitably produce a resulting advantage vis-a-vis other shippers using railroad cars. The "device" for departure from the published rates and the violation of 49 U.S.C. 6(7), 15(15) and 41(1) could hardly be more pronounced. And if the carriers are authorized, indeed ordered, to remit any part of their published charges, it can hardly be said that they have any duty to collect them in the first place.

CONCLUSION.

Left unreviewed, the lower Court's opinion stands for the following:

1) the Commission may in fact divide revenues without reference to the requirements of Section 15(6)(a);

2) there is no need for the carriers to publish demurrage tariffs, since demurrage is not a rate or charge;

3) if the carriers elect to publish and collect demurrage charges, they may remit such moneys in whole or in part to the shippers without fear of sanction under 49 U.S.C. 41(1); and

4) the Commission need not concern itself with time limitations established by the Congress since the reviewing courts are not likely to enforce such restrictions.

These petitioners include both those who will suffer and those who will benefit from the proposed remittitur. They are united, however, in a common belief that the Commission has exceeded its authority and that the lower court has erred in sustaining the agency.

This proceeding deserves a searching scrutiny by this Court. The writ should issue.

Respectfully submitted,

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